No. 15334

In the United States Court of Appeals for the Ninth Circuit

LUCKY LAGER BREWING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.
HILBERT P. ZARKY,
MELVA M. GRANEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the United States Court of Appeals for the Ninth Circuit

No. 15334

LUCKY LAGER BREWING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 34-48) are reported at 26 T.C. 836.

JURISDICTION

The Commissioner determined a deficiency against taxpayer in income and excess profits taxes for the calendar year 1950 in the amount of $102,343.94, of which $92,108.20 is in dispute. (R. 35.) Taxpayer was notified of the deficiency on April 6, 1954 (R. 11), and on May 24, 1954, filed a petition for review thereof with the Tax Court (R. 3, 5-10) under the provisions of Section 272 of the Internal Revenue Code of 1939. The decision of the Tax Court was entered on July 23, 1956.

(R. 4, 49.) A petition for review by this Court of the Tax Court's decision (R. 50-54) was filed on September 27, 1956 (R. 4). This Court accordingly has jurisdiction of the case under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether taxpayer's "gross receipts" under Section 435(e) of the Internal Revenue Code of 1939 were the "total amount received or accrued * * * from the sale * * * of [its] stock in trade", as the statute provides, or that amount less the amounts taxpayer paid as federal and state beer excise taxes.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 435 [As added by Sec. 101 of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*— * * *

* * * * *

(b) *Base Period.*— * * *

(c) *Average Base Period Net Income—Determination.*— * * *

(d) *Average Base Period Net Income—General Average.*— * * *

* * * * *

(e) [as amended by Sec. 504(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] *Average Base Period Net Income—Alternative Based on Growth.*

(1) *Taxpayers to which subsection applies.*— A taxpayer shall be entitled to the benefits of

this subsection if the taxpayer commenced business before the end of its base period, and if either—

(A) (i) the total assets of the taxpayer as of the first day of its base period (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter), determined under paragraph (3), did not exceed $20,000,000, and
(ii) the total payroll of the taxpayer (as determined under paragraph (4)) for the last half of its base period is 130 per centum or more of its total payroll for the first half of its base period, or the gross receipts of the taxpayer (as determined under paragraph (5)) for the last half of its base period is 150 per centum or more of its gross receipts for the first half of its base period; or

* * * * *

(5) *Gross Receipts.*—As used in this subsection the term "gross receipts" with respect to any period means the sum of:

(A) The total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, and

(B) The gross income, attributable to a trade or business regularly carried on by the taxpayer, received or accrued during such period excluding therefrom—

(i) Gross income derived from the sale, exchange or other disposition of property;

(ii) Gross income derived from discharge of indebtedness of the taxpayer;

(iii) Dividends on stocks of corporations; and

(iv) Income attributable to recovery of bad debts.

* * * * *

(26 U. S. C. 1952 ed., Sec. 435.)

Treasury Regulations 130, promulgated under the Internal Revenue Code of 1939:

SEC. 40.435-2. *Average base period net income—Alternative based on growth.—*

Section 435 (e) provides alternative methods of computing the average base period net income of certain taxpayers whose growth during the base period is shown by increased gross receipts or payroll during the last half of the base period * * *

SEC. 40.435-4 [As amended by T.D. 5973, 1953-1 Cum. Bull. 321]. *Qualifications for computation of alternative base period net income based on growth.—*

(a) *In general.—* * * *

(b) *Eligibility requirements—General rule.*—A taxpayer which commenced business before the end of its base period shall be entitled to the benefits of section 435(e) if its total assets as of the beginning

of the first day of its base period did not exceed $20,000,000 and either—

* * * * *

(2) the taxpayer's gross receipts for the last half (the last 24 months) of its base period are at least 50 percent greater than the taxpayer's gross receipts for the first half (the first 24 months) of its base period.

* * * * *

STATEMENT

The Tax Court's findings of fact (R. 35-42) may be restated as follows:

Taxpayer is a California corporation which brews and sells beer. It keeps its books on the accrual basis of accounting and uses the calendar year. (R. 35.)

Its base period for excess profits tax purposes was the calendar years 1946, 1947, 1948, and 1949. The adjusted basis of the assets it held on January 1, 1946, was less than $20,000,000. It did not have the privilege of filing a consolidated return with any other corporation for 1950 (the taxable year) or any other year. (R. 35.)

The following represent, for the base period years, the total amounts received or accrued by taxpayer from the sale of beer and reported by taxpayer on its income tax returns as gross sales (R. 35-36):

1946	$12,878,751.99
1947	16,311,138.47
	$29,189,890.46
1948	$18,161,135.39
1949	23,003,696.22
	$41,164,831.61

The total for the later two years is 141 per cent of the total for the prior two years. (R. 36.)

In its income tax returns for the base period years taxpayer deducted, as part of the cost of goods sold, the following amounts of federal and state excise taxes paid or accrued upon beer manufactured and sold (R. 36):

1946	$4,849,076.70
1947	5,687,831.75
1948	5,837,412.88
1949	7,192,289.27
	$23,566,610.60

If these amounts are excluded from gross sales, the total for the later two years is 150.8 per cent of the total for the prior two years. (R. 36.)

Taxpayer had additional items of gross receipts in the base period years. When those figures are added to gross sales, the ratio *in*cluding excess taxes is 140.9 per cent and the ratio *ex*cluding excise taxes is 150.57 per cent. Other income during the base period years does not significantly affect the ratios. (R. 36-37.)

On invoices covering shipments to customers within the United States, taxpayer did not state beer excise taxes separate from unit prices. Invoices covering shipments to United States territories (e.g., Hawaii) stated that federal tax was paid and the shipment was exempt from state tax. Invoices covering shipments to United States possessions (e.g., Samoa) stated that the shipment was tax-free. (R. 37.)

During the years 1946 through 1949, taxpayer published, for various trading areas, price schedules showing sale prices and terms. It regularly filed copies of schedules covering California areas with the California

Board of Equalization pursuant to law. The California schedules did not state excise taxes separately. Price schedules for Nevada bore the notation that Nevada state tax was not included. Nevada schedules dated on and after February 1, 1948, specifically deducted California tax. The prices in Nevada from December 1, 1946, to February 1, 1948, were identical to those in Los Angeles from November 15, 1946, to June 20, 1947. Schedules for exports to United States possessions and foreign countries deducted both state and federal taxes in the explanation of the price. Taxpayer did not alter its methods of invoicing or pricing after March 1, 1950. It followed the general procedure in the brewing industry of not showing excise taxes separately on invoices or price lists. (R. 37-38.)

Taxpayer's published annual reports for 1946 through 1949 reported the same gross sales as shown on the returns. They did not show excise taxes separately. (R. 38.)

Prior to March 1, 1950, breweries paid federal excise tax by stamps. Taxpayer carried the amount of unused stamps on hand, along with any state stamps, in an account entitled "Revenue Stamps on Hand". It carried this account as a separate item under "Current Assets" in the annual report, rather than as an inventory item. When beer was canned or bottled, it transferred the amount of stamps surrendered from "Revenue Stamps on Hand" to "Tax on Canned Beer" or "Tax on Bottled Beer". It paid state tax by monthly return on the previous month's sales. After March 1, 1950, federal tax was collected by stamp after the bottled or canned beer was withdrawn for sale or consumption. The beer tax statute remained unchanged during any material year. (R. 38-39.)

Taxpayer credited refunds to the "Tax on Bottled Beer" or "Tax on Canned Beer" accounts, except one substantially delayed refund in 1949, which it credited to "Miscellaneous Income". (R. 38.)

Taxpayer's accounts reflect manufacturing processes from the purchase of raw materials through the brewing, placement of beer in fermenting tanks, movement to aging tanks in cellars, and transfer to the bottling and canning lines. After packaging, beer is sent to the shipping warehouse and from there to distributors. "Inventory Beer in Process", to which a large bulk inventory is transferred when the beer reaches the cellars, reflects costs incurred up to that point including real and personal property taxes and social security taxes. After aging, the beer is withdrawn for bottling and canning, at which time costs of inventory in process are apportioned to a bottled beer cost account and a canned beer cost account, to which accounts bottling and canning costs are also charged. Warehousing and shipping costs are allocated to the bottled beer and canned beer cost accounts, which then show the total cost of beer produced exclusive of excise taxes. (R. 39.)

Taxpayer carried beer on hand in inventory. It recorded taxes paid on unshipped beer in accounts entitled "Inventory—Bottle Tanks—Federal Tax" and "Inventory—Canned Beer—Federal Tax." On the balance sheet it combined these accounts into "the inventory of federal tax", which in turn it combined with the bottled and canned beer cost accounts to arrive at a total inventory figure. (R. 39.)

Since March 1, 1950, taxpayer has used the same accounting method, except that it shows no federal tax related to inventories, since it pays no tax until the

beer is sold. Its method of invoicing and pricing of merchandise remained unchanged. The tax now appears as an expense in the month when the liability accrues, as state excise taxes had always been handled. (R. 40.)

Taxpayer increased its over-all average prices, exclusive of excise taxes, for 1948 and 1949 over 1946 and 1947 by 21.6 per cent. Excise tax rates did not change during the base period. (R. 40.)

No single classification of excise taxes is customary in accounting practice. Some are included in gross sales in corporate returns, while others are customarily excluded. Reports to stockholders generally conform to the company books, but may differ from the tax returns due to statutory requirements of tax reporting. (R. 40.)

Where excise taxes are included in gross sales, tax returns and corporate reports subtract them as part of cost of goods sold, or as an expense deduction, or as a deduction from gross sales in arriving at net sales. Net sales for one period are fequently compared with those of another to determine a company's growth. (R. 40.)

Petroleum companies exclude federal and state gasoline taxes from gross sales. Retail establishments exclude state and city retail sales taxes, as well as luxury taxes, such as on furs. The federal tax on phonographs and television sets is customarily excluded. Those taxes are not regarded as an item of income or expense. (R. 40-41.)

None of nine breweries chosen at random from Securities and Exchange Commission records excluded the excise taxes from gross sales, all reporting the to-

tal proceeds from beer sales. These breweries treated excise taxes in three different ways: Seven deducted the taxes from gross sales to arrive at net sales; another deducted both cost of goods sold and excise taxes from sales to determine gross profit; the ninth included excise taxes in cost of goods sold, dropping a footnote thereto stating that excise taxes of a certain amount were included. (R. 41.)

A manufacturer makes no distinction as to excises on sales to a distributor or directly to the consumer. (R. 41.)

Amounts of retail sales taxes collected, sometimes unknown, do not necessarily correspond to the amounts excluded from gross sales. California practice calls for application to the gross collections of a percentage based on an analysis of purchases as agreed to by the State Board of Equalization. Even though the retailer records the actual tax collected, he must apply the tax rate to his sales regardless of collections. Fractional differences in certain transactions necessarily result in an overage or shortage. Failure of collections to correspond to exclusions from gross sales does not improperly reflect income. (R. 41.)

"Gross receipts" is not clearly or precisely defined by accountants, who usually keep accounts on the basis of "gross sales" and "net sales". (R. 42.)

Taxpayer's excess profits net income was overstated in the notice of deficiency by $70,772.21 for 1949, but understated by that amount for 1948. (R. 42.)

Taxpayer's gross receipts for the last half of the base period are less than 150 per cent of its gross receipts for the first half of its base period. (R. 42.)

The Tax Court held that taxpayer's "gross re-

ceipts'' for the base period years (1946 through 1949) included the total amounts it received from the sale of its beer, not just those amounts less the federal and estate excise taxes it paid or accrued, and that, therefore, in computing its excess profits tax credit taxpayer is not entitled to the benefits of the growth formula provided in Section 435(e) of the Internal Revenue Code of 1939. (R. 42-48.)

SUMMARY OF ARGUMENT

In computing its excess profits tax credit, taxpayer is entitled to use the growth formula provided in Section 435(e) of the 1939 Code only if its ''gross receipts'' for the last half of its base period (the years 1946 through 1949) were 150 per cent of its gross receipts for the prior two years. They were not. Taxpayer's contrary position is based upon a contention that its ''gross receipts'' for the base period years were its gross sales *less* the amounts it paid as federal and state beer excise taxes, whereas the statute specifically defines ''gross receipts'' as including, without any qualification, the ''total amount received or accrued * * * from the sale * * * of stock in trade''. It is not contended that the amounts of the beer taxes were received by taxpayer as a trustee or fiduciary and such a contention would in any event be without merit. The federal beer tax was a tax liability of taxpayer as being imposed on the manufacture, not the sale, of beer. The tax liability was one whose economic burden could be passed on to consumers but in that respect it was no different from a tax on real or personal property or from any other expense connected with the manufacture of the beer and reflected in the sales price. If passed on, the

amounts of the beer taxes were nevertheless a part of the total amounts received by taxpayer from the sale of its beer. The statutory definition of "gross receipts" precludes an interpretation of the term "gross receipts" as permitting a deduction of the beer taxes from gross sales.

It is no answer to say, as taxpayer does, that the amounts of the beer taxes were not received "from the sale * * * of stock in trade" because taxpayer was not in the business of selling excise taxes. Whatever amounts taxpayer added to its sales prices because of the tax were paid by the purchasers to get the beer and for nothing else.

Contrary to taxpayer's contention, there is no occasion to interpret the statutory definition of "gross receipts" contrary to its express language. The Congressional intent is entirely consistent with the statutory language. Taxpayer's argument to the contrary is based on an assumption that the "gross receipts" test was intended as an accurate measurement of growth in terms of physical volume of production as related to different corporations and industries, whereas Congress used the "gross receipts" test as an objective one which, without precise regard to proportionate increases in physical volume of production as between different corporations and industries, would operate to exclude those corporations from use of the growth formula whose growth had not been substantially more rapid than the average. Taxpayer has not shown, and cannot show, that it qualifies for use of the growth formula on the basis of its increase in physical volume of production. The state decisions on which taxpayer relies are inapposite

as involving taxes laid on the sale of a product rather than on its manufacture—situations where the seller was in the position of a conduit for collection of a tax.

ARGUMENT

Taxpayer's "Gross Receipts" Under 1939 Code Section 435(e) Were the Total Amounts It Received From the Sale of Its Beer, Not Those Amounts Less the Federal and State Beer Excise Taxes It Paid

Taxpayer is seeking to compute its excess profits tax credit for 1950 with the use of the growth formula provided in Section 435(e)(2) of the Internal Revenue Code of 1939, printed in Appendix A to taxpayer's brief, pp. i to iii. It is eligible to use that formula only if it meets the requirement of Section 435(e)(1)(A)(ii), *supra,* that its—

> gross receipts * * * (as determined under paragraph (5)) for the last half of its base period [the years 1946 to 1949, inclusive] is 150 per centum or more of its gross receipts for the first half of its base period; * * *

Taxpayer's claim that it meets this requirement is based upon its interpretation of the words "gross receipts" as meaning (aside from other gross income) the amounts it received from the sale of its beer *less* the amounts it paid or accrued in the base period years as federal and state beer excise taxes. It is only when the amounts of the excise taxes are deducted from the amounts received that the ratio of gross receipts for the last two years of the base period is 150 per cent or more (actually 150.57 per cent) of

the gross receipts for the prior two years.[1] The Tax Court held that the amounts paid as beer excise taxes cannot be deducted to arrive at "gross receipts" (R. 42-48) and that holding, we submit, is correct.

It is "gross receipts * * * (as determined under paragraph (5))" to which the eligibility requirement of Section 435(e)(1)(A)(ii) has reference. Paragraph (5), *supra,* specifically defines "gross receipts" for any period as meaning, so far as pertinent here, (a) "The total amount received or accrued during such period from the sale * * * of stock in trade of the taxpayer * * *" and (b) other gross income with certain exceptions. Quite obviously, "The total amount received or accrued during such period from the sale * * * of stock in trade of the taxpayer", which is the only part of the definition with which we need here be concerned, means gross sales. In any event, "gross receipts" includes the "total amount received or accrued" by taxpayer from the sale of its beer (its stock in trade), not that amount less some part thereof, such as the amounts of the beer excise taxes. There is no contention that taxpayer received the amounts of the beer excise taxes as a trustee or fiduciary, rather than in its own right, and any such contention would be without merit. As the Tax Court stated (R. 48), taxpayer could pass on the economic burden of the taxes but the tax liability was its own. See *Lash's Products Co.* v. *United States,* 278 U. S. 175, and other cases cited by the Tax Court, R. 48. Thus, there is no possible jutification for deducting the amounts of the beer excise taxes from the "total amount received or accrued" by taxpayer from the sale

---

[1] If the federal tax is not eliminated, taxpayer does not qualify as a corporation entitled to use the growth formula even disregarding the state tax. (R. 48, fn. 8.)

of its beer. The statutory definition of "gross receipts" is conclusive and prohibits the deduction of the amounts of the excise taxes from taxpayer's "gross receipts".

Taxpayer's argument to the contrary (Br. 15-25) is based upon the fact that under the statutory definition of "gross receipts" the amounts received must be "from the sale * * * of stock in trade of the taxpayer". Ignoring the words "total amount received or accrued * * * from", taxpayer asserts that beer, not excise taxes, was its stock in trade and that it was in the business of selling beer, not excise taxes. (Br. 20.) We agree that taxpayer did not sell excise taxes, that beer was its stock in trade, and that beer is what it sold. But that is merely to say that the amounts taxpayer received from its customers were amounts received from the sale of beer, its stock in trade. As the Supreme Court stated in *Lash's Products Co.* v. *United States, supra,* p. 176—

> The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. * * *
>
> * * * The amount added because of the tax is paid to get the goods and for nothing else.

Taxpayer itself recognized that the amounts of the beer taxes were received by it from the sale of its beer, for in its income tax returns and in its published annual reports its "gross sales" included the amounts of the tax. (R. 35-36, 38.)

Taxpayer argues that, to the extent of the amounts of the beer excise taxes, the amounts it received from its customers were not "receipts" and were not "received" by it from the sale of its stock in trade because the amounts of the excise taxes constituted reimburse-

ment for taxes already paid and were therefore not profit to taxpayer. (Br. 22.) The same argument could be made in respect of other taxes paid by taxpayer, such as real and personal property taxes, and as to any and all other items of cost and expense in relation to the beer. But that would be to make eligibility for use of the growth formula depend upon *net* sales or *net profit,* whereas the test provided by Congress is with respect to "*gross* receipts" (italics supplied), defined as including the "total" amount received or accrued from the sale of stock in trade.

Taxpayer's criticism of the Tax Court's interpretation of the definition of gross receipts as rendering a large part of the statutory definition surplusage (Br. 23-25) is unjustified. The criticism is based upon an assumption (see Br. 24) that the Tax Court interpreted the statutory words "total amount received" as including everything received by the corporation irrespective "of what the amounts were received for". While the Tax Court did at one point refer to the statutory words "as including everything received by the corporation in its own right" without specifying for what it was received, the reference obviously was to receipts from sales, for the Tax Court specifically stated that the beer taxes "were included in the amount received for its stock in trade by petitioner". (R. 47.) In a subsequent part of its brief taxpayer criticizes the Tax Court's interpretation of the statutory definition by making a tangential argument regarding use taxes collected by a retailer but for which the consumer has the primary responsibility. (Br. 49-50.) That argument ignores the fact that the Tax Court's interpretation of the statutory definition (R. 47) was that it includes amounts received, from the sale of stock in trade, by the vendor "in its own right".

Taxpayer makes arguments which are apparently designed to show that the Congressional intent and purpose is such that the statutory definition of "gross receipts" should be interpreted contrary to its literal language. The arguments have no merit, as we shall now show.

(1) One argument is that the Congressional purpose will be served if taxpayer is allowed to use the growth formula for computing its excess profits credit, under which its 1950 profits would be compared with its 1949 profits, because, in view of its growth in each successive base period year, the increase in its profits for 1950 over 1949 reflects the increase in its profits due to the Korean conflict and that is what Congress intended to tax. (Br. 10-13.) The argument is fallacious in that it overlooks that Congress assumed that all corporations would have increased profits due to the Korean conflict (see Br. 11, 27-28) and provided for an excess profits credit which, so far as pertinent here, had to be used by a corporation unless its business grew so "substantially more rapidly than the average during the base period years" that it became eligible to use the different growth formula provided in Section 435(e), *supra*. H. Rep. No. 3142, 81st Cong., 2d Sess., p. 24 (1951-1 Cum. Bull. 187, 203); S. Rep. No. 2679, 81st Cong., 2d Sess., p. 27 (1951-1 Cum. Bull. 240, 258). In brief, this argument of taxpayer merely leads back to the question of whether taxpayer meets the eligibility requirement for use of the growth formula.

(2) On the premise that Congress intended the "gross receipts" test to "accurately" and "properly" (Br. 27) measure a corporation's growth in terms of its increase in physical volume of production (Br. 26-27), taxpayer makes a lengthy argument (Br. 28-40)

intended to support its assertion that the inclusion of the amounts of the beer excise taxes in "gross receipts" produces "an unintended lack of uniformity in the operation of the statute" (Br. 33) and then, without any supporting argument, taxpayer concludes its brief with a statement that its own interpretation of the statutory definition "will give uniform application to the law * * *, will lend ease and simplicity to administration, and will avoid absurd distinctions" (Br. 51). The arguments are both specious and fallacious.

If taxpayer were correct in assuming that the pertinent eligibility requirement was intended to "accurately" and "properly" measure growth by physical volume, how would taxpayer qualify for use of the growth formula"? The eligibility statute (Section 435(e)(1)(A)(ii)) does not state what percentage of increase in physical volume is sufficient. In terms of percentage alone, the increase must be 50 per cent for the last two years of the base period (150 per cent of the first two years) and taxpayer does not contend that it had any such an increase in physical volume. Actually, its increase in physical volume was apparently about 23.66 per cent.[2]

But of course the "gross receipts" eligibility requirement was not intended to "accurately' measure the increase in physical volume. What Congress said with respect to it (H. Rep. No. 3142, *supra,* p. 24 (1951-1 Cum.

---

[2] We have arrived at this figure on the assumption that the physical volume of taxpayer's production can be determined, at least with approximation, by dividing the total amount of the excess taxes it paid for any given year by the rate of tax, $8.62 a barrel ($8 a barrel for the federal tax (Br. 3) and $.62 a barrel for the state tax (Act 3796 of the General Laws of California, Sec. 23)), which remained constant throughout the base period years.

Bull. 187, 203); S. Rep. No. 2679, *supra*, p. 27 (1951-1 Cum. Bull. 240, 258)) is that—

> The *use* of the alternative gross receipts test *is justified* by the fact that a corporation may increase its physical volume of production materially by introducing additional equipment and new operating procedures which do not involve a corresponding increase in its labor force [the alternative eligibility requirement under which taxpayer cannot qualify]. *The percentages used in the payroll and gross receipts tests are sufficiently large so that only those taxpayers will be able to qualify for the alternative credit whose business has grown substantially more rapidly than the average during the base period years.* (Italics supplied.)

As the Tax Court stated (R. 46)—

> Neither the gross receipts test nor the payroll test, which is the alternative, are direct measures of physical volume of production. Gross receipts may rise at least in part due to an increase in the price of the commodity sold, as they did in the present case.

Congress was concerned with an increase in physical volume of production but its intent and purpose was to provide an eligibility test *not* based on increase in physical volume of production but which, because of the high percentages used therein would normally have the effect of excluding from use of the growth formula those businesses whose increase in physical volume was not substantially more rapid than the average. The "gross receipts" test was not intended to accurately measure growth by physical volume of production; it

was intended simply as an objective test of exclusion from use of the growth formula.

Taxpayer's arguments and examples relating to discrimination and lack of uniformity (Br. 33-39) have relation to the application of the "gross receipts" test on the basis of *growth in the physical volume of production* rather than on the basis of gross receipts. Taxpayer's particular complaint seems to be that inclusion of the beer excise tax in its gross receipts requires "more growth" from it than from other corporations. (Br. 33.) But, as already shown, Congress did not provide a test by which one corporation's growth in volume of production could be accurately measured against another corporation's growth in volume of production. Naturally, a test based on gross receipts will not accurately reflect the proportion of increase in the volume of production as between different corporations or business. That is true whether the comparison is made with relation to beer excise taxes, as taxpayer makes it, or as to any other tax or item of expense paid by a corporation. Theoretically, under the "gross receipts" test eligibility for use of the growth formula could even be created by a 50 per cent increase in the selling price of the commodity without any addition to physical volume of production, whereas a corporation with a substantial increase in physical volume of production but no increase in price might not be able to qualify for use of the growth formula. But lack of uniformity as related to physical volume of production is not a ground for rewriting the "gross receipts" test. That test is one under which taxpayer is excluded from use of the growth formula no matter how its growth

in volume of production compares with other corporations or industries, for Congress assumed that, if a taxpayer could not meet that test, its growth was not substantially more rapid than the average so as to justify use of the growth formula. Taxpayer simply has not shown any Congressional intent or purpose warranting a construction of the definition of "gross receipts" contrary to its express language.

It should also be noted that taxpayer is in error in asserting (Br. 51) that its "interpretation" of the words "gross receipts" as permitting deduction of the amounts of its beer excise taxes "will give uniform application to the law * * *, will lend ease and simplicity to administration". To accept taxpayer's "interpretation" is to embark upon an emasculation of the statutory language. If taxpayer were allowed to deduct the amounts of its beer excise taxes from its "gross receipts", why should not this taxpayer and other taxpayers be allowed to deduct their real and personal property taxes and any other expense connected with their business? To say that they can is to replace the "gross receipts" test with a "net income" test.

It is the "gross receipts" test as applied in the light of the definition of "gross receipts" contained in the statute which is simple and easy of application. It just does not have the result taxpayer would like for it to have as applied to itself. Taxpayer barely qualifies under the requirement that gross receipts for the last half of the base period be 150 per cent of the gross receipts for the prior two years even when the amounts of the excise taxes are deducted from its gross receipts. To allow that deduction is to hold

that this taxpayer may use the growth formula even though it does not qualify therefor under the test provided by Congress.

Taxpayer explains that the statutory phrase "gross receipts" is not in general use in accounting or in income tax law (Br. 40-43) and argues that a decision that excise tax collections are not part of gross receipts "gives less administrative difficulty" (Br. 42). But this Court does not have power to rewrite the statutory definition of "gross receipts" on the ground that a different definition will give less administrative difficulty. Moreover, there is no particular administrative difficulty connected with the present definition. The term "gross receipts" is a broad and reasonably well understood term and is defined without qualification as including the "total amount received * * * from the sale * * * of stock in trade." Thus, "gross receipts" obviously includes "gross sales", a term in which this taxpayer and nine other breweries chosen at random included the beer excise taxes. (R. 35-36, 41.)

Finally, taxpayer relies upon certain state decisions for an interpretation of the statutory definition as permitting the deduction of the beer excise taxes. (Br. 43-46.) The cases all involved the interpretation of state statutes. The only one involving the federal tax on liquor (*F. Strauss & Son* v. *Coverdale,* 205 La. 903, 18 S. 2d 496) is obviously inapposite.[3] In three of the cases (*Standard Oil Co.* v. *State Tax Com'r,* 71 N. D. 146, 299 N.W. 447; *Standard Oil Co.* v.

[3] The holding there was only that the federal tax on liquor is not includible in the inventory value of property for the purpose of a local *ad valorem* tax. In contrast, as the present record shows (see R. 68), in California the tax base for personal property taxes includes the federal beer excise tax.

Michigan, 283 Mich. 85, 276 N.W. 908; *Ross Jewelers* v. *State,* 260 Ala. 682, 72 S. 2d 402) it was held that, under the particular statute involved, the federal gasoline tax or the federal excise tax on luxuries was not includible in the base on which a state sales tax was payable. In the other case (*Socony-Vacuum Oil Co.* v. *City of New York,* 247 App. Div. 163, 287 N.Y.S. 288), the state sales tax was held to be excludable from the base on which a city sales tax was payable. In all four cases the courts stressed (1) the fact that the excluded tax was imposed only upon the *sale* of the article and (2) that an interpretation of the state statute as imposing a tax upon a tax should be avoided.

The holdings that a tax on *sales* should be excluded from the base on which a state or city sales tax is to be paid do not in any way support a conclusion that the federal beer excise tax should be excluded from gross receipts in determining eligibility for use of the growth formula in computing the excess profits tax credit. The state cases involved situations where the seller was but a conduit for collection of a tax, whereas the federal beer excise tax is a tax on the manufacture, not the sale, of beer.[4] That type of tax is a part of the price, and therefore of the amount received by the seller, for the beer. *Lash's Products Co.* v. *United States,* 278 U.S. 175. Indeed, in one of the cases relied upon by taxpayer (*Ross Jewelers*

---

[4] The federal beer excise tax is imposed "on all beer, * * * *brewed or manufactured* and sold, or removed for consumption or sale * * *" (italics supplied). Sec. 3150(a) of the 1939 Code. The tax is accordingly laid on the manufacture of the beer, not on its sale. See *Lash's Products Co.* v. *United States,* 278 U.S. 175; *Liggett & Myers Co.* v. *United States,* 299 U.S. 383.

v. *State, supra,* p. 690) the tax excluded from the base for payment of the state sales tax was distinguished from a tax imposed upon the seller.

Contrary to taxpayer's assumption (Br. 43), the statutory definition of "gross receipts" is not "in doubt". There is no occasion for resort to an interpretation of the definition on the basis of state decisions or otherwise. The federal beer excise tax is so clearly a part of the vendor's "gross sales", and thus of its "gross receipts", that taxpayer and other breweries included it in their "gross sales". (R. 35-36, 41.) Taxpayer did not even separately state the amount of the tax in either its sales invoices or price schedules. (See R. 37, 38; Stip. Exs. III and IV.)

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.
HILBERT P. ZARKY,
MELVA M. GRANEY,
Attorneys,
Department of Justice,
Washington 25, D.C.

MARCH 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 421263 1037